UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIMITRI KAPSALIS, Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Appellee.	)	NO. 21052

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General

JAMES B. CUNEO
Deputy Attorney General

6000 State Building
San Francisco 94102
Telephone: 557-2081

Attorneys for Appellee

TOPICAL INDEX

	Page
JURISDICTION	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	3
SUMMARY OF APPELLEE'S ARGUMENT	4
ARGUMENT	
I. THE COURT IS WITHOUT JURISDICTION AND THE APPEAL SHOULD BE DISMISSED	5
II. THE PETITION DID NOT STATE FACTS ENTITLING APPELLANT TO RELIEF IN THE DISTRICT COURT	7
III. APPELLANT DELIBERATELY BYPASSED STATE PROCEDURES FOR RAISING THE ISSUE OF INEFFECTIVE AID OF COUNSEL	9
CONCLUSION	11
CERTIFICATE OF COUNSEL	12

TABLE OF CASES

	Page
Application of Cameron 247 F.2d 775 (9th Cir. 1957)	6
Boyden v. Webb 208 F.2d 201 (9th Cir. 1953)	7
Carnes v. United States 279 F.2d 378 (10th Cir. 1960) Cert. denied 364 U.S. 846 (1960)	6
Escobedo v. Illinois 378 U.S. 478 (1964)	8, 10
Fay v. Noia 372 U.S. 391 (1963)	11
Holliday v. United States 244 F.2d 801 (9th Cir. 1957)	10
Johnson v. New Jersey 384 U.s. 719 (1966)	8
Linden v. Dickson 278 F.2d 755 (9th Cir. 1960)	7, 9
Maye v. Pescor 162 F.2d 641 (8th Cir. 1947)	10
Poe v. Gladden 287 F.2d 249 (9th Cir. 1961)	6
Schlette v. People 284 F.2d 827 (9th Cir. 1960) cert. denied 366 U.S. 940 (1961)	7, 9

Table of Cases (Continued)

	Page
U.S. ex rel. Lutz v. Ragen 171 F.2d 788 (7th Cir. 1948) Cert. denied 337 U.S. 910 (1948)	6 - 7
Wagoner v. Fairview Consolidated School District No. 5 289 F.2d 480 (10th Cir. 1961) Cert. denied 368 U.S. 921 (1961)	6

TEXTS, STATUTES, AUTHORITIES

Rule 73(a) Fed. Rules of Civil Procedure 28 U.S.C.	6
Title 28 U.S.C.	
§§ 2107	5
2254	11

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DIMITRI KAPSALIS, Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Appellee.	)	No. 21052

APPELLEE'S BRIEF

JURISDICTION

The order of the United States District Court for the Northern District of California denying the petition for a writ of habeas corpus, in the proceeding entitled Kapsalis v. Wilson, No. 44636, was issued January 7, 1966 (R. 19-20). Appellant's application for a certificate of probable cause and motion for leave to appeal in forma pauperis were filed April 15, 1966 (R. 21). An affidavit showing appellant was without funds necessary to prosecute the appeal was filed at the same time (R. 23). The district court certified that there was probable cause for the appeal and granted appellant's motion for leave to appeal in forma pauperis on May 17, 1966 (R. 26). Appellant invokes the

jurisdiction of this court pursuant to 28 U.S.C. § 1915 and 28 U.S.C. §2253.

STATEMENT OF THE CASE

This brief represents the initial appearance of the California Attorney General, on behalf of appellee and respondent Lawrence E. Wilson, in this matter. Appellee filed no pleadings in the court below.

Appellant was convicted on March 6, 1963, in the Superior Court for Contra Costa County, after a plea of guilty, of one count of first degree murder in violation of California Penal Code section 187 (R. 2). No appeal was taken from the conviction.[1/]

A petition for a writ of habeas corpus was filed in the Superior Court for Marin County and denied on October 13, 1964 (R. 5, 6). The Marin court number was 41140 (R. 7). Petitions were also filed in the District Court of Appeal, First Appellate District, and the California Supreme Court, and were denied on August 11, 1965 and September 29, 1965 respectively (R. 5, 6). The numbers of these cases were Crim. 5272 in the District Court of Appeal and Crim. 9368 in the California Supreme Court (R. 7).

---

1. Though appellant states in the petition before the district court that he did appeal, the remainder of the petition shows that the subsequent proceedings were for habeas corpus.

Appellant is presently imprisoned in the California State Prison at San Quentin and is serving a life sentence from which he becomes eligible for parole on March 6, 1970 (R. 2).

STATEMENT OF THE FACTS

The record before the district court consisted of appellant's petition (R. 1-12) and a copy of the petition for writ of habeas corpus which had been submitted to the California Supreme Court (R. 13-17).

The petition before the district court contained allegations that prejudicial error was committed by the admission of evidence of appellant's statements elicited from him following arrest and before he had been advised of his right to counsel, that petitioner was interrogated without the aid of counsel while in a state of stupor due to barbiturates which he had taken prior to the arrest and that at no time was he advised of his rights nor the defenses available to him. The petition further alleged that at no time had medical evidence been introduced to show the nature of his competence, that he was "emotionally disturbed", that he was incapable of entering a rational plea, and that his act was mitigated by temporary insanity and a history of "instability" (R. 3-4).

The petition further indicated that petitioner had been represented by counsel at the time of arraignment

and plea and sentencing (R. 8). The remainder of the petition consisted of information concerning the various courts to which petitioner had applied for relief, a list of the purported "evidence" showing his previous record of emotional disturbance and a list of cases and citations to constitutional provisions (R. 4).

The petition for writ of habeas corpus which had been submitted to the California Supreme Court which was marked "Exhibit A" and submitted as part of the record on appeal (R. 13-17) contains substantially the same allegations. These allegations were that petitioner was interrogated without the aid of counsel for several days while in a state of stupor, that he was never advised of his constitutional rights and did not know the defenses available to him, that it was error to admit the confession taken without counsel present and that no evidence had been introduced showing his incompetence at the time and that he was incapable of entering a rational plea (R. 14-15).

SUMMARY OF APPELLEE'S ARGUMENT

I. The court is without jurisdiction and the appeal should be dismissed.

II. The petition did not state facts entitling appellant to relief in the district court.

III. Appellant deliberately bypassed state procedures for raising the issue of ineffective aid of counsel.

ARGUMENT

I

THE COURT IS WITHOUT JURISDICTION AND THE APPEAL SHOULD BE DISMISSED

Appellant's original petition in the district court was denied January 7, 1966 (R. 19). His application for certificate of probable cause and notice of appeal was filed April 15, 1966 (R. 21). The district court certified that there was probable cause for the appeal and granted the motion for leave to appeal in forma pauperis on May 17, 1966 (R. 26). It was 98 days from the time the order denying the writ of habeas corpus was issued until appellant's notice of appeal was filed in the district court.

Title 28 U.S.C. section 2107 provides that no appeal shall bring any judgment, order or decree before the court for review unless notice of appeal is filed within 30 days after the entry of such judgment, order or decree. The section further provides that the district court may extend the time for appeal not exceeding 30 days from the expiration of the original time proscribed upon showing of excusable neglect based on failure of the

party to learn of the entry of judgement, order or decree. This requirement is also codified as Rule 73(a) of the Federal Rules of Civil Procedure, 28 U.S.C. It has long been established that the 30-day provision is applicable in habeas corpus proceedings. Poe v. Gladden, 287 F.2d 249, 250 (9th Cir. 1961); Application of Cameron, 247 F.2d 775 (9th Cir. 1957).

While appellee is reluctant to place such procedural technicalities in the path of a hearing of the issues raised by appellant, he feels duty bound to do so in light of the fact that these requirements are jurisdictional. Wagoner v. Fairview Consolidated School District No. 5, 289 F.2d 480, 481 (10th Cir. 1961), cert. denied, 368 U.S. 921 (1961); Carnes v. United States, 279 F.2d 378, 379 (10th Cir. 1960), cert. denied, 364 U.S. 846 (1960). Nor does the fact that the district court issued a certificate of probable cause and allowed appellant to proceed have any effect of giving this Court jurisdiction. Even if construed as an extention, the time allowed was greater than that specified by statute. The time limited by statute for taking an appeal from an order dismissing writ of habeas corpus cannot be extended by waiver, consent or order of the court. U.S. ex. rel. Lutz v. Ragen, 171 F.2d 788 (7th Cir. 1948), cert. denied, 337 U.S.

910 (1948).

II

THE PETITION DID NOT STATE FACTS ENTITLING APPELLANT TO RELIEF IN THE DISTRICT COURT

Where the district court has dismissed a petition without the issuance of an order to show cause the question on appeal becomes whether, assuming the allegations of the petition to be true, a violation of some federal constitutional guarantee has been shown. Boyden v. Webb, 208 F.2d 201, 203 (9th Cir. 1953). It is imperative that the petition allege primary facts which show that the state prosecution departed from constitutional requirements. Schlette v. People, 284 F.2d 827 831-832 (9th Cir. 1960), cert. denied 366 U.S. 940 (1961). Conclusionary statements are insufficient and the facts must be set out "with particularity and in detail in the petition for the writ." Linden v. Dickson, 278 F.2d 755, 757 (9th Cir. 1960).

The only factual allegation contained in the petition with any degree of particularity were those alleging that prejudicial error was committed by the admission in evidence of appellant's confessions elicited while he was in a state of stupor and before any warning of his constitutional rights to remain silent and to have the assistance of counsel (R. 3-4).

As appellant was convicted on his plea of guilty, there was never any trial and no evidence of any sort was admitted against him. Escobedo v. Illinois, 378 U.S. 478 (1964), holds that where a prisoner is questioned after criminal investigation has focused upon him as a suspect, his request for counsel was denied, and he is not advised of his right to remain silent, and he confesses during the pre-trial interrogation, the confession is inadmissible as evidence. As no such statements constituted the basis of any conviction against appellant, the rule is inapplicable in this case.

The district court went even further in protecting the right of appellant and assumed that some evidence had been taker in violation of his constitutional rights. The court nevertheless determined that because of appellant's conviction was final prior to June 22, 1964 and the Escobedo rule should not be applied retroactively, there was no violation of any constitutional prohibition (R. 19-20). This position has subsequently been affirmed by the United States Supreme Court in Johnson v. New Jersey, 384 U.S. 719 (1966).

With respect to appellant's allegation that he was incompetent to enter a plea at the time it was made, and that there was thus no voluntary waiver of

his right to trial, appellee asserts that the allegation in the petition was insufficient to show that the state prosecution had departed from constitutional requirements. This allegation (R. 4) apparently asserts that there was error in the failure of prosecution to introduce evidence showing that appellant was capable of entering an intelligent plea. There is no allegation that he was in fact incapable at the time of plea or specific allegations showing that counsel should have raised this point at the time of arraignment and plea. The allegation was thus insufficient to raise the constitutional question and the district court properly disposed of it on its face. See Schlette v. People, 284 F.2d 827, 831-832 (9th Cir. 1960), cert. denied 366 U.S. 940 (1961); Linden v. Dickson, 278 F.2d 755, 757 (9th Cir. 1960).

III

APPELLANT DELIBERATELY BYPASSED STATE PROCEDURES FOR RAISING THE ISSUE OF INEFFECTIVE AID OF COUNSEL

In his opening brief, appellant brings forth the issues of denial of counsel at the pre-trial stages and denial of effective assistance of counsel for the first time in these proceedings. He asserts the denial of a constitutional right to counsel at the pre-trial

stages despite statements in his original petition that he was represented by counsel at the time of his arraignment and plea and sentencing (R. 8). He further asserts that counsel made no effort to advise him of his rights and of the defenses which would be available to the crime or to prepare any defense in appellant's behalf.

Because these contentions were not raised before the district court, the necessary factual allegation to support them are not a part of this record. It is well established that the Court of Appeal in reviewing the denial of an application for habeas corpus may consider only the record made in the trial court and cannot go outside the record for the facts. Holliday v. U.S., 244 F.2d 801, 802 (9th Cir. 1957); Maye v. Pescor, 162 F.2d 641 (8th Cir. 1947).

Aside from the obvious lack of proper allegations to raise this issue before the district court, reference to the record shows that appellant has failed to exhaust his state remedies on this issue. Considerations on the petition for writ of habeas corpus which appellant had previously filed with the State Supreme Court of California (R. 13-17) reveals that it nowhere contains any allegations of lack of counsel at the pre-trial stages, except with regard to the Escobedo

issue, or lack of effective assistance from counsel.

Appellant alleged in his original petition that he had previously raised the issues sought to be raised by this petition in the Supreme Court of California (R. 5). There is no indication that he filed more than one petition with the Supreme Court of the State. The district court was thus without jurisdiction to consider this issue even had it been properly raised. 28 U.S.C. § 2254; Fay v. Noia, 372 U.S. 391, 435 (1963).

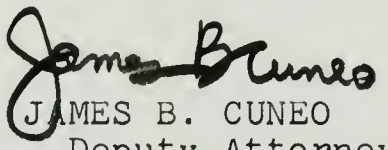
CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the district court denying the petition for the writ of habeas corpus should be affirmed.

DATED: January 13, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General



JAMES B. CUNEO
Deputy Attorney General

Attorneys for Appellee

JBC:mcf
1/13/67
65-1984

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: January 13, 1967

JAMES B. CUNEO
Deputy Attorney General